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No. 87-1575

In The
Supreme Court of the United States
October Term, 1987

THE ORION CORPORATION,
Petitioner,
v.
STATE OF WASHINGTON, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioner, the Orion Corporation (Orion). Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

This case involves a surprising reversal of state law which seriously erodes vested property rights in tidelands long ago conveyed by the state to private owners. These conveyances were seen as serving the public interest by opening the lands for private development and increasing the state's tax base. The Washington Supreme Court for years has held that such tidelands are owned in fee simple absolute and free of any public trust claims. By the opinion below, however, these tidelands are now declared to be subject to a public trust and thus devoted to public purpose and use. Acquisition for public use has been achieved by judicial fiat.

Amicus believes the opinion below poses a serious threat to the integrity of the individual right of property by violating constitutional prohibitions against the taking of property without compensation as well as due process guarantees. The result violates fundamental notions of fairness and equity.

STATEMENT OF THE CASE

When the State of Washington was admitted to the Union, it took title under the Equal Footing Doctrine to the beds of navigable waters in the state including tidelands up to the mean high tide line. This case involves such tidelands. They are located on Padilla Bay which is part of Puget Sound.

Many years ago, the State of Washington decided that it would be in the overall public interest to convey tidelands into private ownership including those now owned by Orion.[1] There was no thought that such lands should be preserved in their natural state.[2]

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1 "From its first session, the Washington State Legislature passed numerous laws for the purpose of encouraging the development of certain tidelands by lessees and purchasers thereof." *Harris v. Hylebos Industries, Inc.*, 81 Wash. 2d 770, 776, 505 P.2d 457, 461 (1973).

2 "The notion that all tidelands must be left in their natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood." *Harris*, 81 Wash. 2d at 776, 505 P.2d at 461.

Indeed, such conveyances were seen as opening land for improvement and development thus attracting private capital, enhancing the economic resources of the state, and increasing the state's tax base.[3] This matter was even specifically addressed at the Washington Constitutional Convention in 1889. It was there concluded that the state's best interests would be served by looking to private investment and development of the state's tidelands provided that harbor areas would never be conveyed away.[4] Since such lands were subject to the ebb and flow of the tides, their reclamation by diking and filling was encouraged. As stated by the Washington Supreme Court below:

> "We acknowledge that during the early part of the 20th century, state policy included the widespread sale of tideland property and the encouragement of diking and filling." *Orion Corporation v. State*, 109 Wash. 2d

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[3] "[I]t had been the policy of this state and the practice of its commissioner of public lands to encourage the improvement and development of state tidelands by private capital and industry." *Boyer v. State*, 19 Wash. 2d 134, 140, 142 P.2d 250, 254 (1943).

[4] *See, e.g., State v. Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913):

> "Those who sat in the constitutional convention, and those who met in our early legislative assemblies, were confronted with an important problem when treating the subject of tide and shore lands. Many insisted that the state should reserve title and that the land should never be sold. Others maintained that the best interests of the state demanded that they pass into private ownership, thus becoming a subject of taxation and revenue to the state. The latter theory prevailed, subject to the qualification that the harbor area should never be disposed of. The state has invited investment in these lands upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes."

621, 639, 747 P.2d 1062, 1072 (1987), appendix to petition (App.) at A-39, 40.

Many such conveyed tidelands were filled and developed. Some, of course, were not. But the latter were nevertheless held by their owners, and bought and sold, in the full expectation that they were owned in fee simple absolute free of any retained state claim. Prior Washington Supreme Court cases unequivocally upheld the right of the state to convey tide and shore lands so as to afford grantees with the right of exclusive possession and enjoyment unencumbered by any public trust claim.

Thus, in *Palmer v. Peterson,* 56 Wash. 74, 75-76, 105 P. 179, 180 (1909), a case also involving Puget Sound tidelands, the court ruled:

> "It is lastly contended that inasmuch as the tide lands in controversy are covered by water to a depth of seven or eight feet at high tide, such waters are navigable, and the appellant has a lawful right to pass over the same, notwithstanding the title of the respondents. This contention cannot be sustained. The state deed is absolute in form, and carries with it the right to the exclusive possession and enjoyment of the lands granted, if such a grant was within the competency of the state, and that such a grant was within the competency of the state cannot, at this late day, be controverted."

See also Puget Mill Company v. State of Washington, 93 Wash. 128, 160 P. 310 (1916), where it was argued that shore lands adjacent to Lake Washington were under navigable waters at the time of their sale and were therefore held in trust for the people of the state for purposes of navigation and commerce. It was thus asserted that

such lands could not be disposed of so as to vest absolute title in private parties. The Washington Supreme Court rejected this argument stating:

> "It seems to us that this contention cannot be sustained in the light of the history of the state's policy since admission to the Union and the decisions of this court. . . . Now it is no longer an open question in this state as to the nature of the title vested in the grantees of second-class tide and shore lands by deeds from the state absolute in form as these deeds are, upon which are rested the titles of the plaintiffs. The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands." 93 Wash. at 134-35, 160 P. at 312-13.

Moreover, such conveyances were not seen as substantially impairing the public's right of navigation, commerce, and fishing. First of all, the state provided means for defining and locating harbor areas along the shores of navigable waters to accommodate needed commerce. Procedures were adopted for identifying and making certain the location of such harbor areas which would thus be treated separately from those tide and shore land areas which would be conveyed into private ownership.[5] Secondly, sales of tidelands, such as those in Padilla Bay,

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[5] "It is true that, by the limitations prescribed by article 15 of our constitution, the state authorities are prohibited from disposing of and vesting in absolute private ownership the lands of the state lying under navigable waters which shall be established as harbor areas; but it is also true that the same article of our constitution provides that the location of such harbor areas along the shores of navigable waters

(Continued on following page)

though perhaps excluding some minor type of public boating during times of high tide, were not considered as a substantial impairment to the public's use of the navigable waters. *Palmer*, 56 Wash. at 75-76, 105 P. at 180. This, of course, is readily understandable when one considers the overall size and extent of Puget Sound. It is thus not surprising that such deeds were seen as absolute in nature and as authorizing the exclusion of members of the public who might otherwise seek to use such waters. *Id.*

In short, under established Washington law, *tidelands were treated as land and not as navigable waters.* They were conveyed into private ownership on that basis. This point was made clear in *Harris v. Hylebos Industries, Inc.*, 81 Wash. 2d 770, 505 P.2d 457. There the court distinguished the earlier case of *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (1969). In *Wilbour*, the court took judicial notice that a lake was navigable and that it was used by the public for recreational purposes. The court, in *Wilbour*, held that the public had the right to use the entire surface of the lake and that the defendants had no right to encroach thereon with fill obstructing this use in the absence of some governmental authorization to do so. In *Harris*, the court held that *Wilbour* had no application to tidelands which had previously been conveyed by the state. The court stated:

(Continued from previous page)

shall be determined and established by a commission appointed for that purpose, thus rendering certain the line dividing shore lands which may be disposed of and vested in absolute private ownership from the lands within harbor areas which cannot be lawfully so disposed of." *Puget Mill Company v. State of Washington*, 93 Wash. at 134, 160 P. at 312-13.

> "As the opinion will reveal, none of the cases cited herein pertaining to the legal status of tidelands deeded to private individuals by the state were considered pertinent to the question before the court in [*Wilbour*]. The obvious reason is that such tidelands, as we have heretofore pointed out, *have never been classified by the state as navigable waters, but rather have been treated as land.* Particularly, where such lands lie in city harbors, as here, they have been regarded as most suitable for reclamation and for dedication to the purposes of commerce and industry." 81 Wash. 2d at 785-86, 505 P.2d at 466 (emphasis added).

Times have changed!

The State of Washington now wants to retroactively undo what it has done in the past. The reason for the judicial creativity which underlies the opinion below can be simply stated. The facts are fully documented in Orion's petition.

Many tidelands (at least those not previously filled and developed) are today seen as an important environmental resource. This includes those owned by Orion. At first, consideration was given to the possibility of acquiring such lands by eminent domain. It was then decided that the state's objectives could be achieved by regulation. This, however, gave rise to the potential that such regulation might be held to go too far and would thus constitute a taking for which compensation would have to be paid. This litigation was commenced to challenge such regulation. But the final solution to the state's dilemma was not really achieved until the Washington Supreme Court, in its holding below, concluded, contrary to the law in effect when Orion purchased its property, that the lands

Orion purchased have always been subject to a public trust. The court held that it was beyond the power of the state to relinquish the trust. *Orion,* 109 Wash. 2d at 639, 747 P.2d at 1062, App. at A-40.

The Washington Supreme Court thus concluded that any analysis of the effect of the state's regulatory actions would have to be based on the premise that Orion's lands are already subject to what is in effect an easement for public purposes. The court also expressly recognized that it had "extended the doctrine beyond its navigational aspects." *Id.* at 641, 747 P.2d at 1073, App. at A-44. The court said:

> "The public trust doctrine resembles 'a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife.'" *Id.* at 640, 747 P.2d at 1072-73, App. at A-42.[6]

But even with respect to navigation, the court completely reversed its earlier holdings which treated such property as land and not as navigable waters. Although the earlier cases upheld the right of the property owners to exclude members of the public, the court now holds that Orion has no right to make any use of its property which would impair the public's right of navigation and fishing thereon. *Orion,* 109 Wash. 2d at 641, 747 P. 2d at 1073, App. at A-45. Thus the right to exclude the public, previously recognized, is declared to no longer exist.

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[6] Compare *State v. Sturtevant,* 76 Wash. at 165, 135 P. at 1037, where the court stated:

> "The only right which the state has ever undertaken to maintain in trust for the whole people is the right of navigation."

SUMMARY OF THE ARGUMENT

This amicus brief will not address issues of whether the state's *regulatory schemes* go so far as to constitute a taking. This brief addresses solely the question of whether the Washington Supreme Court can, by judicial fiat, impose a public trust easement upon Orion's lands. The question addressed is whether a state court can, consistent with the requirements of the Fifth and Fourteenth Amendments to the United States Constitution, retroactively declare that a public right in private property exists where no such right existed under the laws of the state when the property was originally conveyed or, for that matter, when it was acquired by Orion. Fundamental issues of fairness and equity obviously are involved.

This Court recently considered the public trust doctrine in *Phillips Petroleum Company v. Mississippi*, — U.S. —, 56 U.S.L.W. 4143 (Feb. 23, 1988). There the dissent criticized extension of the doctrine observing that conveyances of such lands to private parties could be stricken down by the states if state law permits. 56 U.S.L.W. at 4150. The majority opinion, however, pursued an analysis based on "reasonable expectations in property interests" and found that unequivocable statements in earlier Mississippi cases provided ample indication of the state's public trust claim. 56 U.S.L.W. at 4147. The majority responded to the dissent by stating that the decision "does nothing to affect ownership rights in States which previously relinquished a public trust claim to tidelands." *Id.* The majority further noted that each state had the right to dispose of such lands "according to its

own views of justice and policy'' (quoting *Shively v. Bowlby,* 152 U.S. 1, 26 (1894)). *Id.*

The question now presented is whether a state can adopt a policy of conveying such lands free of any public trust, can create the sort of ''reasonable expectations'' alluded to by the majority in *Phillips Petroleum,* and can then change its mind and reclaim that which it had earlier conveyed away.

This amicus brief will argue the following points: First, the right of a state to dispose of its tidelands, and to convey such lands unencumbered by a public trust if this is seen to best serve the public interest, is a matter of state law; second, the State of Washington, having conveyed the tidelands herein free of any public trust claim, may not, at this late date, assert such a claim; and third, the decision of the Washington Supreme Court below is final and thus the case is ripe for review by this Court.

Important issues are presented which should be addressed by this Court. If the Washington Supreme Court can retroactively impress a public trust easement on property previously held to be free of any such easement, other states can do the same. By declaring these tidelands to now be open to public entry and use, the Washington Supreme Court has accomplished precisely that which was denounced with reference to the Kuapa Pond in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Moreover, the reasonable expectations of the property owners, an apparent critical consideration in *Phillips Petroleum,* will have been seriously interfered with.

As observed by Justice Brennan in *Nollan v. California Coastal Commission*, 483 U.S. —, 97 L. Ed. 2d 677, 696 (1987) (Brennan, J., dissenting):

> "Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose."

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ARGUMENT

I

THE STATES HAVE BEEN FREE TO DETERMINE, AS A MATTER OF STATE LAW, THE MANNER OF TIDELAND DISPOSITION

This Court has consistently held that a state is free to dispose of its sovereign lands, acquired with respect to navigable waters, "in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states. . . ." *Weber v. State Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 66 (1873); *Shively*, 152 U.S. 1; *Hardin v. Jordan*, 140 U.S. 371, 382-83 (1891); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 374-75 (1977). The states have thus been free to relinquish any claim to such lands consistent with the federal navigational servitude. *Oregon ex rel. State Land Board*, 429 U.S. at 375; *Barney v. City of Keokuk*, 95 U.S. 324 (1877). In *Barney*, the Court said that if the states choose to resign to others "rights which

properly belong to them in their sovereign capacity, it is not for others to raise objections." *Id.* at 338.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892), is often said to stand for the proposition that the states have not been free to convey such lands free of a public trust. *Illinois Central* stands for no such proposition and nothing in *Illinois Central* is inconsistent with the reasoning of the numerous cases cited above.

Unlike the conveyancing procedures adopted by the State of Washington, which affected tide and shore lands, and which specifically provided for the retention of harbor areas, the Illinois legislature, in *Illinois Central*, had attempted to convey the *permanently submerged bed* of Lake Michigan placing under control of the railroad company all of the natural harbor area adjacent to downtown Chicago.

In discussing the public trust, this Court said:

> "The control of the State for the purposes of the trust can never be lost, *except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.*" *Id.* at 453 (emphasis added).

Indeed, this Court in *Illinois Central* specifically recognized the right of the respective states to dispose of sovereign lands "when that can be done without substantial impairment of the interest of the public in waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states." *Id.* at 435.

In *Palmer*, 56 Wash. at 76, 105 P. at 180, the Washington Supreme Court specifically considered the effect of

Illinois Central on Washington's tideland conveyances. After quoting the above language, the Washington court concluded:

> "The conveyance by the state of tide lands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states."

Palmer thus held that a state deed, absolute in form, "carries with it the right to exclusive possession and enjoyment of the lands granted." *Id.*

Illinois Central must also be read in light of this Court's later decision in *Appleby v. New York*, 271 U.S. 364 (1925). There the issue was the power of the state and the City of New York to part with property under navigable waters, free of subsequent regulatory control. *Id.* at 380. The Court held that the matter was one of *state law*, and concluded that the grantees were vested with fee simple title, that the state and city had parted with both "the jus publicum and the jus privatum," and further that the city could only be revested with its prior rights "by a condemnation of the rights granted." *Id.* at 399. The conclusion in *Illinois Central*, which was viewed as "a statement of Illinois law," *id.* at 395, was distinguished on the basis that there the conveyance embraced the entire Chicago harbor and "adjoining submerged lands which would in all probability be thereafter included in the harbor." *Id.* at 393.

In short, *Appleby* clearly upholds the authority of the State of Washington, authority which it previously

exercised, to dispose of tidelands in a manner unencumbered by the public trust.

II

THE DECISION BELOW, IF ALLOWED TO STAND, WILL RESULT IN A TAKING OF ORION'S PROPERTY WITHOUT JUST COMPENSATION

The court below has determined that Orion's property is subject to a public trust easement. While the full scope of the easement was not defined, the property owner's right to exclude members of the public is now denied. The court said that the trust is both for the benefit of the public and the land's dependent wildlife. *Orion,* 109 Wash. 2d at 640, 747 P.2d at 1072-73, App. at A-42. The court also said that the trust goes beyond traditional "navigational aspects" and includes fishing, swimming, water skiing, and other related recreational purposes. 109 Wash. at 641, 747 P.2d at 1073, App. at A-44. The owner's right of use was held to be restricted to uses which would not substantially impair "public rights" under the trust and this restriction on Orion's right to its own use of the property was justified because a "property right must exist before it can be taken." 109 Wash. at 641, 747 P.2d at 1073, App. at A-45-46.

As observed by this Court in *Summa Corporation v. California ex rel. State Lands Commission,* 466 U.S. 198, 205 (1984), such an owner is left with little more than "a naked fee."

Considered in light of relevant Washington precedents, it is clear that the court's action, if allowed to stand, would violate Orion's due process rights and would result in a

taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

As stated in *Puget Mill Company v. State of Washington*, 93 Wash. at 135, 160 P. at 313:

> "We conclude, then, that the plaintiffs acquired absolute fee simple title to these added shore lands, as they did to the shore lands existing at the time of the execution of the deeds therefor by the state.
>
> "Now this being the nature of the plaintiffs' titles, *it is elementary constitutional law that such titles cannot be impaired by any act of the state after making the deeds upon which they rest.*" (Emphasis added.)

Since the Takings Clause addresses the state *as an entity*, it follows that the act of the Washington Supreme Court, in the decision below, "is to be deemed the act of the state" within the meaning of the Fourteenth Amendment. *Chicago, Burlington, and Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897).

As stated in *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring):

> "To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court."

See also Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *cert. granted and remanded on other grounds*, 477 U.S. 902 (1986). There, the Ninth Circuit observed that a state may change its laws by judicial decree as well as by legislative action. *Robinson*, 753 F.2d at 1474. But, the Court held that rights recognized under prior state law concepts cannot constitutionally be altered by simply announcing new concepts. *Id.* Relying on *Hughes*, the court held that such rights cannot be divested without payment of just compensation. *Id.* "New law, however, cannot divest rights that were vested before the court announced the new law." *Id.*

III

THIS CASE IS RIPE FOR REVIEW

This Court granted certiorari in *Robinson v. Ariyoshi* and remanded the case for further consideration in light of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Robinson*, 477 U.S. 902. This was done at the urging of the Solicitor General who argued that subsequently certified questions to the Supreme Court of Hawaii made it clear that its decision was not a final determination of the issue presented.[7]

Such is not the case here. The Washington Supreme Court has held, in no uncertain terms, that Orion's lands are now subject to a public trust and open for public use.

Assuming, as this amicus believes must be assumed, that the effect of the decision is to transfer a property

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[7] See Brief for the United States as Amicus Curiae, No. 85-406 at 1-2, 20.

interest to the public in and to lands previously held in fee simple absolute, ripeness considerations are simply not present. *Williamson County* involved the application of various zoning regulations and hence presented a *regulatory* taking issue of whether the regulations went "too far." It had to first be determined how far the regulations went before it could be determined whether they went too far. *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986).[8]

The public trust issue addressed here, however, does not involve *administrative zoning regulation*. Instead, it involves a *final judicial determination* subjecting Orion's property to an expansive public trust.

An easement for public use has been impressed upon the property. The public is invited to enter. Property impacts, and issues of remaining economically viable use, are thus irrelevant to the question of whether a taking has occurred. As stated in *Nollan v. California Coastal Commission*, 97 L. Ed. 2d at 685:

> "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis . . . we have no doubt there would have been a taking."

That is precisely what the Washington Supreme Court has done in this case.

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[8] Even with respect to the regulatory taking aspects of the decision below, it should be noted that the Washington Supreme Court has twice concluded that any permit application would be futile and hence that the regulatory taking claims are ripe for review. *Orion*, 109 Wash. 2d at 632-33, 747 P.2d at 1068-69, App. at A-22-25.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: April, 1988.

Respectfully submitted,

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